

Rhode Island Import Service Corporation and Anthony Sirago. Case 1-CA-17264

July 22, 1981

DECISION AND ORDER

On January 30, 1981, Administrative Law Judge Almira A. Stevenson issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This case was heard in Boston, Massachusetts, November 17 and 19, 1980. The charge was served on the Respondent March 13, 1980. The complaint was issued April 30, 1980, and duly answered by the Respondent.

The issue is whether or not the Respondent discharged Anthony Sirago because he engaged in protected concerted activity, in violation of Section 8(a)(1) of the National Labor Relations Act.¹

Upon the entire record including my observation of the demeanor of the witnesses, and after consideration of briefs filed by the General Counsel and the Respondent, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Facts

The Respondent is engaged at Providence, Rhode Island, in receiving foreign-made automobiles unloaded at the Port of Providence, repairing damage caused in marine transit, installing accessories, warehousing the cars, and shipping them out to dealers. The Respondent admits, and I find, that General Manager Michael Miranda and Assistant Manager Kenneth Lisker are its supervisors and agents.

The Respondent's repair work is controlled by the General Adjusting Bureau (GAB) which designates the

time required to repair each dent and scratch; and by the "National Warranty Manual" which specifies a flat rate for each necessary repaint job. The Respondent's bodymen and combination (body repair and paint) men work a 40-hour week at a fixed rate per hour. The time each worked on all cars assigned to him is compared at the end of each week with the total time designated for those cars by GAB and a bonus is paid, at an increased rate, for the difference between 40 hours and the hours designated by GAB for the work performed. A bodyman is paid only one time for repairing and painting a car; he is not paid for time spent on rework. Necessary rework done by dealers is billed to the Respondent but the Respondent does not pass any such charges back to the bodyman who performed the unacceptable original repair.

The Respondent hired Anthony Sirago in late August 1979 and discharged him January 15, 1980, after about 4-1/2 months of employment. Sirago was a combination man who had 7 years' experience in bodywork and also did painting. Sometime in November Sirago discussed what he considered the poor lighting and inadequate heating in the shop with Fred Placella and then asked General Manager Miranda for better lights, and more heat to offset the increasingly cold weather. Sirago also took these complaints to William Hendle, the Chrysler Corporation quality control representative.² The heat actually did fail one day during the winter, and Miranda sent the bodymen home.³

Sirago frequently painted extra panels in order to blend the color into the original finish. As the National Warranty Manual provides payment only for painting the panel which is damaged, he was not compensated for work on any extra panels, a matter about which he and Placella complained to Miranda on several occasions. On the Thursday before his discharge, Sirago painted several extra panels on a car, and pointed out the amount of work involved to Hendle who said he would see what he could do about it. Sirago then complained to Miranda that he was not being paid for all the time he spent on the car. Miranda responded that "he couldn't do nothing about it, we had to eat the job and that was it," and he had been through all that with Sirago and Placella before.⁴

The following Monday, the day before his discharge, Sirago asked Miranda whether it was true, as Sirago had been informed, that beginning with the next ship which arrived, painters would be credited with .5 of an hour for every extra panel they painted. Miranda responded that "he didn't have to tell me anything about the

² Based on Sirago's essentially uncontradicted testimony. Hendle did not testify, nor did Placella. Miranda could not deny that Sirago complained about the lighting and the heat, and Saab-Scania Port Operations Manager Haaken Svantessen testified that bodymen had to take cars outside in order to determine repainting color match. However, I do not credit Sirago that Miranda told him not to take complaints to Hendle, in view of Miranda's flat denial.

³ Based on the undisputed testimony of Miranda and Svantessen.

⁴ Based on Sirago's undisputed testimony. Miranda recalled Sirago's complaining more than once, including once during the week before his discharge, about not being compensated for painting extra panels to blend the colors better. There is no probative basis for finding that Hendle interceded with the Respondent to obtain additional pay for bodymen's painting extra panels.

¹ No issue is raised as to jurisdiction. Based on the allegations of the complaint and the admissions of the answer, I find that the Respondent is engaged in commerce within the meaning of the Act.

panels." Mirago asked if that meant he would be paid for the extra panels, but Miranda replied, "I don't like your attitude, I don't have to tell you nothing. . . ."⁵

On Tuesday, January 15, 1980, Miranda showed Sirago a gold-color Chrysler Colt wagon which Sirago had repaired. Dents on the roof and hood were visible and the paint was wavy. Miranda told Sirago the car was a disaster and Miranda would get back to him. Less than an hour later, Miranda sent for Sirago and discharged him for the stated reason that the quality of his work and his attendance were poor.⁶

Miranda testified that the reasons for Sirago's discharge were poor quality of work, poor attendance, low production, and poor attitude. Assistant Manager Kenneth Lisker corroborated Miranda with regard to Sirago's performance in all respects. Refining his testimony, Miranda said that poor quality of work and poor attendance were the operative reasons while low production and attitude were supporting factors.

With regard to quality, Miranda said it became apparent within a week or so after Sirago's hire that the quality of his work was substandard but Miranda attributed this, at first, to Sirago's newness on the job and possible nervousness, and decided to let him alone for a month hoping for improvement. No improvement was forthcoming, however, and Miranda discussed the matter with Sirago some 10 or 11 times, and he and his assistant, Kenneth Lisker, began to check the cars processed by Sirago before releasing them, and instructed the cleaners to report any defects in Sirago's work observed during after-repair cleaning. Miranda testified, with corroboration by Haaken Svantessen, that in November, Svantessen informed Miranda that Sirago's work was unacceptable and that Sirago was to do no more repair work on Saab cars. So Miranda instructed Sirago not to work on Saabs any more and warned him of discharge if he did not produce better work.⁷

With respect to Sirago's attendance, the Respondent introduced absence reports showing that Sirago was late, left early, or absent on 20 occasions during his 4-1/2 months on the payroll. A breakdown of these reports reveals one such incident in August, five in September, three in October, six in November, three in December, and two in January. A check of Sirago's timecards in evidence shows an even more erratic attendance pattern than the Respondent attributes to him. Thus, he punched in on or before his 8 a.m. shift time only 26 of the ap-

proximately 90 days he was scheduled to work, and almost 20 of those punch-ins were for early overtime; he missed 8 days; and in addition he worked less than 8 hours on 18 days.

Evidence as to production consists of records of bonus payments to bodymen during the period beginning with the week ending September 4 and ending December 25. Of the six employees identified as bodymen, these records show that Sirago earned bonuses totaling \$492 for an average of \$29 a week for the entire 17-week period. By comparison, Frederick Placella earned \$653 for an average of \$41.⁸ David Furtato earned \$254 in bonuses for an average of \$63 a week.⁹ Edmond Gendreau earned \$198 for an average of \$49.¹⁰ Peter Follows earned \$4,112 in bonuses for an average of \$257 a week.¹¹ Joseph Munson earned \$3,245 for an average of \$203 a week.¹²

Miranda testified that the poor attitude to which he referred was reflected in Sirago's reaction, when Miranda and Lisker spoke to him about the quality of his work or his attendance, that he did not care, that he always had an excuse for being late or not doing better work.

As to the timing of the discharge, Miranda testified that although he did not specifically inform Sirago, he decided on December 23 or 24 to discharge Sirago but postponed taking action on the decision until after the holidays. He would have therefore discharged Sirago sometime in January in any event, but the incident which triggered the discharge, or "the straw that broke the camel's back," as he put it, occurred when Lisker and the cleaners brought to Miranda's attention the condition of the gold-color Chrysler Colt wagon which had been repaired by Sirago.

2. Conclusions

The General Counsel contends there is no merit in the Respondent's accusations about Sirago's work performance which are only pretexts to conceal its real reasons which were Sirago's grievances about the heat and lighting in the body shop and about the Respondent's refusal to compensate bodymen for time spent painting extra panels; and that it was Sirago's repetition of the latter grievance during the week, and on the day, before his discharge which triggered his termination.

I have found, however, that the Respondent displayed no animosity toward Sirago for complaining about the heat and lighting but, on the contrary, allowed the employees to go home one day when the heat went out. Moreover, there is no evidence of animosity toward Sirago on the several occasions when he requested payment for painting extra panels until the day before the discharge when Miranda's irritation showed through. The question is whether that irritation was the real reason for the discharge.

⁵ Based on Sirago's undisputed testimony.

⁶ Based on Miranda's credited testimony. Ron Capraro, who was hired as a combination man in February 1980 and did the repair work on the gold Chrysler Colt wagon, corroborated Miranda on the poor quality of the repair work Sirago had done, and I do not credit Sirago that there was only some dust and a few scratches which he could have buffed out in half an hour. Nor do I credit Sirago that Miranda told him at the time of discharge, "I'm not giving you any reasons or explanations," because it is so improbable and because overall Miranda's demeanor for veracity was more convincing than Sirago's.

⁷ Documentary evidence offered in support of testimony regarding quality of work consists of one instance of rework by Sirago in October 1979; and substantial charges by dealers for redoing work performed by Sirago which were not, however, brought to the Respondent's attention until after Sirago's termination. Miranda explained that records are not ordinarily kept of rework done on the premises before cars are shipped out and that records of rework on Chrysler cars are not kept by the Respondent but forwarded to Detroit.

⁸ Placella's name did not appear on one weekly payroll register.

⁹ Furtato's name appeared on only four payroll registers in September.

¹⁰ Gendreau's name appeared on only four payroll registers in September.

¹¹ Follows' name did not appear on one weekly payroll register.

¹² Munson's name did not appear on one weekly payroll register.

In defense, the Respondent has shown Sirago's performance was poor during his entire brief period of employment. Thus, he was undependable in attendance by any standard, and he was a slow producer as revealed by the fact that his bonus earnings were the lowest of all. Moreover, there is no reason to reject the corroborative testimony that his attitude toward criticism on these and quality-control matters was less than acceptable. Further, the quality of his work was so inferior that one of the automobile manufacturers refused to allow him to work on its cars. Finally, there was a valid triggering incident which provided a business justification for discharge.

Additional facts support the Respondent's defense. Thus, I find, contrary to Sirago's denials, that General Manager Miranda counseled him on several occasions about his performance, and warned him of possible discharge at the time Saab-Scania complained about his work. The record also shows that two other bodymen, David Furtato and Edmund Gendreau, were recommended for discharge, and either left or were discharged for below-standard performance shortly after Sirago was hired.

Accordingly, although Sirago engaged in protected concerted activity while employed by the Respondent and although General Manager Miranda voiced annoyance with such activity on the day before he terminated

Sirago, I find that such activity played no part in the termination. Based on the absence of animus or disparate treatment, Sirago's substandard work and attendance, the counseling and warning extended to him which he seems to have ignored, and his defective repair of the Chrysler Colt wagon brought to Miranda's attention on the day of discharge, I find that the preponderance of the evidence establishes that Sirago was discharged for cause, I recommend that the complaint be dismissed.¹³

Upon the foregoing findings of fact and conclusions of law and the entire record, I hereby issue the following recommended:

ORDER¹⁴

The complaint is dismissed in its entirety.

¹³ In arriving at this conclusion I have taken into consideration the refusal of the Rhode Island Department of Employment Security to disqualify Sirago because no misconduct in connection with his work was proved.

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.